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To: Assembly Committee on Transportation

From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities

Date: August 30, 2011

Re: Support for AB 180, the Pothole Liability Bill

The League of Wisconsin Municipalities supports Assembly Bill 180, which provides municipality's with the ability to assert a defense of immunity from liability for discretionary highway maintenance decisions.

A similar bill passed both houses in the 2005-06 session, but was vetoed by Governor Doyle at the request of the Wisconsin Academy of Trial Lawyers.

Municipal officials support AB 180 for the following reasons:

- By eliminating the pothole liability exception in sec. 81.15, Stats., the bill treats discretionary highway maintenance decisions by municipal officials the same as other discretionary actions by municipalities – they are immune from liability.
- It makes the rule of immunity for discretionary municipal functions consistent and uniform.
- It retains the three-week grace period provided to municipalities for snow and ice removal that has been in existence since 1898.
- These changes will reduce or stabilize local government liability insurance premiums.

For these reasons we urge you to recommend passage of AB 180. Thanks for considering our comments on this important bill.



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EXECUTIVE DIRECTOR

**Testimony of
Joe Strohl
on behalf of the
Wisconsin Association for Justice
before the
Assembly Transportation
Rep. Jerry Petrowski, Chair
on
2011 Assembly Bill 180
August 30, 2011**

CHAIRMAN PETROWSKI AND MEMBERS OF THE COMMITTEE, my name is Joe Strohl. I am representing the Wisconsin Association for Justice (WAJ) in opposing AB-180. Thank you for this opportunity to testify.

WAJ opposes AB-180, which deletes the important responsibility of Wisconsin counties, cities, villages and towns to fix bridges, highways, sidewalks, parking lots and shoulders, or be held liable for damages. It is a statute and a concept that has been part of Wisconsin's laws going all the way back to 1849.

While the bulk of incidents resulting from a road or bridge in disrepair may be minor, the public harm that can occur when municipal infrastructure is not repaired was demonstrated in Minnesota just four years ago when the I-35W bridge in Minneapolis collapsed. Thirteen people were killed and 121 people were injured. The 40-year old bridge collapsed into the river and its banks without warning. News programs around the world carried the devastating impact of the fall of the bridge. I think we have all seen the photos.

The I-35W bridge had been inspected yearly since 1993. Part of the bridge had been rated poor in 2006. Despite these concerns the I-35W bridge was rated safe for legal truck loads and permitted overweight truck loads of up to 136,000 lbs. The bridge was not under any restrictions. Each day over 144,000 vehicles crossed this bridge and at the time of the collapse, there were approximately 120 vehicles, carrying 160 people, on the bridge.

If this can happen to a bridge that was not under any restrictions, what about the bridges that are structurally deficient or functionally obsolete?

In 2010, 1,861 bridges in Wisconsin were deemed structurally deficient or functionally obsolete by the U.S. DOT.¹

If AB 180 passes, injuries caused by highways and bridges in disrepair will be treated like any other injury claims against local government entities with immunity for local governments granted for “discretionary” acts. If the repair of roads is found to be a “discretionary” act, the average citizens will be unable to hold local governments responsible for failing to reasonably repair and maintain our bridges and highways. Even minimal ability to collect small damages is wiped out.

There is already a cap of \$50,000 in Wisconsin law for such damages. Most municipalities carry far greater insurance coverage.

Fiscal estimates by the state departments of Transportation and Revenue say savings to local governments are “indeterminate.”

There’s no evidence whatsoever that insurance rates will drop for local governments if they are allowed to shirk responsibility for fixing sidewalks, bridges and roads. And considering the very few lawsuits filed and won annually against municipalities, the idea that – because of these bills – new money will be available to pay for local road repairs is unrealistic.

The legislative policy to protect travelers and users of highways and bridges was recognized in some of the earliest decisions of the Wisconsin Supreme Court going back to 1867.

¹ <http://www.fhwa.dot.gov/bridge/nbi/defbr10.cfm>. A **structurally deficient** bridge is closed or restricted to lighter vehicles because of at least one deteriorating structural component. While not necessarily unsafe, these bridges may have limits for speed and weight. A **functionally obsolete** bridge has older design features, and while it is not unsafe for all vehicles, it may not adequately accommodate current traffic volumes, and vehicle sizes and weights.

This bill is a reaction to the Supreme Court decision from Juneau County (*Morris v. Juneau County*, 219 Wis. 2d 544 (1998)). This decision did not change the law in any significant way. DOT Counsel says the decision has never been about immunity from liability due to alleged highway maintenance defects. Highway maintenance has always been a nondiscretionary duty.

This statute is used when a citizen who has suffered an injury in a motor vehicle crash can prove that a cause of the crash was a failure on the part of a municipality to repair a known defect on a highway. At the time this proposal was adopted in the mid-1800's, it was one of the few areas where liability was imposed on government. Your constituents will still expect their local governments to repair known defects in highways that lead to unsafe conditions. Passing this bill will not change the public's expectation.

Supporters of the legislation have predicted a flood of litigation because of the Juneau County case and that is one of the primary reasons given for the need to repeal the statute. If the argument is made again that there will be increased litigation, you should ask the bill's sponsors what the experience has been in the last 12 years. There has never been much litigation under this statute throughout our history, and we certainly have not seen it rise in the years since the Supreme Court decision. There will be no flood of litigation because these lawsuits are difficult to prove, expensive to bring because they require expert engineering testimony, and limited in recovery because the maximum recovery is \$50,000. Passing this bill will not change that.

We hope you will strongly consider the needs of all Wisconsites for greater safety on their roads and for redress in the unfortunate circumstances when they have been injured. We believe that local governments should have a duty to maintain safe roadways and bridges. We urge you to oppose AB-180.

Thank you.

WCHA Chairman:
Alan Kletti, Ozaukee County

WCHA Vice-Chairman:
Marv Thompson, Barron County

WCHA Past Chairman:
Arlene Benrud, LaCrosse County



WCHA President:
Bruce G. Stelzner, Chippewa County

WCHA Secretary:
Paul Halverson, Douglas County

WCHA Past President:
Mark Servi, Barron County

WCHA Treasurer: Gary Kennedy, Manitowoc County

To: **Honorable Chairman, Petrowski**
Chairman, Assembly Committee on Transportation

Re: Public Hearing for AB 180
Tuesday, August 30, 2011
2:00 PM
417 North (GAR Hall)
State Capitol

Assembly Bill 180

Relating to: liability of cities, villages, towns, and counties for damages caused by an insufficiency or want of repair of a highway.

By Representatives Jacque, Brooks, Bernier, Kaufert, Knudson, LeMahieu, Litjens, Spanbauer, Strachota, Vos and Weininger; cosponsored by Senators Grothman, Galloway, Lasee and Lazich.

On Behalf of the Wisconsin County Highway Association please consider the following written testimony in support of Assembly Bill 180

Statement of: Daniel J. Fedderly P.E.;R.L.S.
Executive Director

Wisconsin County Highway Association (WCHA), regarding AB 180, "pothole liability"

This bill would **not** relieve counties of responsibilities to perform Highway repairs, timely or otherwise. But very simply, all this bill would do is establish that counties face a liability burden that is no higher than that faced by the State of Wisconsin, whose system Counties Maintain, and by whose rules and directives the Counties must follow while they provide maintenance of the State highways. Counties do not have the authority to repair state highways at their own discretion but simply must act under the direction of the state, and for Counties to face a greater liability burden for discretionary work on the state Highways for any defects is an unacceptable and unintended burden on the Taxpayers across the State.

In addition in the Supreme Court Case "*Morris v. Juneau County*, 219 Wis. 2d 544 (1998), the Court held that the statutory provision imposing liability on cities, villages, towns, and counties for highway defects is an exception to the more general provision granting immunity to cities, villages, towns, and counties from liability arising out of the performance of discretionary duties." The Court also indicated in their decision that the Wisconsin Legislature should

consider rectifying this long-standing contradiction in the Statutes by making it clear there are no exceptions to the performance of these discretionary acts and reinforces the Statutory protection regarding the performance of discretionary acts many of which have to do with Maintenance services that Counties provide. This Legislation again attempts to follow the direction of the Supreme Court as well as protect taxpayers and citizens from this unintended contradiction in Statues that creates a burden for taxpayers across the State.

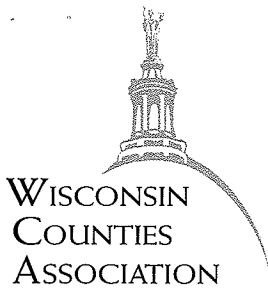
This is important Legislation as the State and Counties across the State continue to work cooperatively providing the very best of Transportation Services while protecting the interest of all taxpayers, thus ensuring the most effective, efficient, and economical Transportation services. The Wisconsin County Highway Association supports AB 180

END STATEMENT

Mr. Fedderly's contact information:

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MEMORANDUM

TO: Assembly Committee on Transportation

FROM: Douglas Parrott, Legislative Associate

DATE: August 30, 2011

SUBJECT: Support for Assembly Bill 180

The Wisconsin Counties Association (WCA) strongly supports Assembly Bill 180 (AB 180). AB 180 repeals language in the Wisconsin Statutes that relate to the liability of municipalities and counties for insufficient or inadequately maintained highways. Under current law, local governments have a greater liability than the State. The Supreme Court has called for legislation to remedy this situation and AB 180 does just that by ensuring the burden faced by local governments is no greater than that faced by the State.

Section 893.80 (4) Wis. Stats. confers immunity for cities, towns, and counties from the performance of a discretionary duty, or duty which requires a governmental entity to use judgment or discretion in carrying out this duty.

The Wisconsin Supreme Court in *Morris v. Juneau County*, held that the statutory provision imposing liability on cities, villages, towns, and counties for highway defects (formerly s. 81.15 and s. 81.17, now s. 893.83) is an exception from liability arising out of the performance of discretionary duties. However, in the *Morris* decision the Supreme Court clearly states that it has repeatedly suggested that the legislature repeal s. 81.15 and s. 81.17, now s. 893.83. The Court states, "Because the Legislature continued to breathe life into a statute which the court stated was no longer needed, we must now give the statute effect."

Potholes and similar road wear can develop with little warning, as weather conditions in Wisconsin are unpredictable and road conditions can literally change in the blink of an eye. A highway could experience a pavement blowout and five minutes later the newly formed pothole could damage a car. A county could be held liable for a situation it was not even aware of.

AB 180 would not relieve counties of their responsibility to perform highway repairs, timely or otherwise. The bill will not allow local governments to be negligent in their

Page 2
WCA Memorandum
August 30, 2011

ministerial duties without liability, as s. 893.80 would not be eliminated. AB 180 simply holds local governments to the same standard as the State.

County highway departments have the very difficult task of maintaining safe roads for a minimal amount of taxpayer dollars. AB 180 will ensure that those dollars go to repairing and maintaining roads rather than costly lawsuits. For these reasons, WCA respectfully requests your positive action on Assembly Bill 180.

Thank you for considering our comments. If you have any questions please do not hesitate to contact me at the WCA office at 608.663.7188.

James T. Dwyer
County Board Chairman

Dan Vrakas
County Executive



August 30, 2011

TO: Waukesha County Delegation

FR: Sarah Spaeth, Legislative Policy Advisor

RE: Support of Assembly Bill 180

Waukesha County urges you to support Assembly Bill 180, which repeals language in Sec 893.83 of the Wisconsin statutes that relate to the liability of municipalities and counties for insufficient or inadequately maintained highways.

Assembly Bill 180 will afford local government the same liability immunity that the state currently receives under Wisconsin Statute. With counties under clear and specific state direction regarding the details of highway maintenance, it is unfair to hold counties to a higher standard of liability for highway defects than the standard applied to the state. Passage of this bill would allow local governments a more level playing field and conserve county resources for the delivery of important services, such as actual repair and maintenance of the highway system.

State funding to help local governments offset their transportation related costs, has not kept up with the increase in the cost of fuel, material, equipment and labor. A less than adequate funding level for highway maintenance, coupled with a great deal of maintenance/repair liability for counties, amounts to a frightening equation for Wisconsin taxpayers. Without this liability reform and with the current levy freeze, local governments will continue to be forced to use limited property taxpayer money to pay for insurance premiums and deductibles to protect against lawsuits rather than for maintaining local roads.

The situation surrounding pothole liability was most recently laid out in the Wisconsin Supreme Court decision *Morris v. Juneau County*, where the Court clearly states that it has repeatedly suggested that the Legislature repeal the statutory language in Sec 893.83. The Court stated, "Because the Legislature continued to breathe life into a statute which the Court stated was no longer needed, we must now give the statute effect."

Legislation to address this issue was most recently introduced in 2005. It passed both houses with bipartisan support, but was vetoed by Governor Doyle.

Thank you for your time and consideration.

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